

ONEIDA INDIAN NATION  
v.  
DEPUTY COMMISSIONER OF INDIAN AFFAIRS

IBIA 91-117-A

Decided February 28, 1992

Appeal from denial of a Technical Assistance grant application.

Vacated and remanded.

1. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters:  
Financial Assistance

Decisions concerning whether a tribe's application for a Technical Assistance grant should be funded are committed to the discretion of the Bureau of Indian Affairs. It is not the function of the Board of Indian Appeals, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

2. Board of Indian Appeals: Jurisdiction--Indians: Financial Matters:  
Financial Assistance

The Board of Indian Appeals has jurisdiction to review an allegation that raises questions as to whether the Bureau of Indian Affairs followed its own guidelines for a financial assistance program.

3. Indians: Financial Matters: Financial Assistance

It is improper for the Bureau of Indian Affairs to deny an application for financial assistance for reasons that are in conflict with the guidelines for the program under which assistance was sought.

APPEARANCES: Ray Halbritter, Nation Representative, for appellant.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Oneida Indian Nation seeks review of a June 26, 1991, decision of the Deputy Commissioner of Indian Affairs, denying its application for a FY 1991 Technical Assistance grant. For the reasons discussed below, the Board vacates the Deputy Commissioner's decision and remands this matter to him for further proceedings.

### Background

The FY 1991 Training and Technical Assistance Grant Program was announced in a March 4, 1991, memorandum from the Acting Deputy Commissioner to all Bureau of Indian Affairs (BIA) Area Directors. The memorandum was accompanied by guidelines for the program and directed the Area Directors to convey copies of the guidelines to the tribes in their areas.

Appellant submitted its application to the Eastern Area Director, who transmitted it to the Deputy Commissioner, recommending approval. The Deputy Commissioner denied the application on June 26, 1991, stating:

The determination that [appellant's] application did not score or rank high enough to receive a grant is based on several factors including the need/problem statement. Because [appellant] does not administer any Federal program it could not satisfy the need criteria on page one of the [guidelines], Fiscal Year 1991, Training and Technical Assistance Grants. That is, audit, financial management, debt and cash flow problems.

Moreover, [appellant's] application content or program narrative indicate total reliance for grant activities on outside consultants. A more considered approach would be to have tribal staff perform grant activities. A grant can cover the cost of a staff person and if this approach were taken the ability would be developed within the Oneida Nation. Also the need for management systems (personnel, procurement, etc.) while valid, is either an unnecessary cost or an exceptionally high cost; at \$25,000. The Eastern Area Office should be able to provide [appellant] with several copies of the five required management systems. [Appellant] could then adjust the systems for [its] particular situation. Certainly any established consulting firm has numerous such systems on a shelf or in its computers. The \$25,000 is excessive in the extreme. We also note there is no budget justification nor is the cost reasonable to the Government; see item (5), page two under application content.

Further, there are no vitae or resumes of the third party technical assistance providers, only promotional material from the consulting firms. And finally, [appellant] has no monitoring or management control system to ensure grant activities which could result in the accomplishment of the goal and objectives of the grant.

Appellant's notice of appeal from this decision was received by the Board on August 15, 1991. Only appellant filed a brief.

### Discussion and Conclusions

[1] Appellant objects to the denial of its application on a number of grounds, not all of which will be addressed in this decision. Some of

appellant's arguments challenge the Deputy Commissioner's analysis of its application. To the extent the Deputy Commissioner's analysis was based on the judgment necessary to the award of grants under a competitive process, the Board lacks jurisdiction over it. As the Board has stated on several occasions, its role in appeals of this nature is not to substitute its judgment for that of BIA, but rather to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion. E.g., Sauk-Suiattle Indian Tribe v. Portland Area Director, 20 IBIA 238 (1991), and cases cited therein.

[2, 3] Some of appellant's arguments, however, raise questions as to whether BIA followed its own guidelines for the grant program. Such issues are subject to review by the Board. Cf., e.g., Hamilton v. Acting Anadarko Area Director, 17 IBIA 152 (1989).

Appellant alleges that, at the time it was preparing its application, it inquired about the possibility of using grant funds to hire staff; it further alleges that an employee of the Division of Self-Determination Services, Central Office, BIA, replied that funds could not be used to hire staff but must be used to obtain outside technical assistance, such as consultants. Appellant made this allegation in its notice of appeal and again in its opening brief. BIA has not refuted the allegation although it had the opportunity to do so through the filing of an answer brief. Therefore, appellant's allegation must be taken as correctly stating the facts.

The guidelines mention third-party technical assistance providers in at least two places and do not mention tribal staff at all. A conclusion could well be drawn from the guidelines that the use of third-party providers was preferred, if not required. In contrast, nothing in the guidelines can be read for the proposition that the use of tribal staff was preferred over the use of third-party providers.

Given the wording of the guidelines and the advice given to appellant by an employee of the BIA office which managed the grant program, the Board finds that it was improper for the Deputy Commissioner to use as a reason for denial the fact that appellant proposed to rely exclusively on third-party assistance. Cf., e.g., Price v. Portland Area Director, 18 IBIA 272 (1990); Hamilton, supra.

Appellant disputes the Deputy Commissioner's statement that it did not administer any Federal programs; it notes that its application stated that it had received two small Indian Health Service grants since 1990. The Board observes that there is no explicit requirement in the guidelines that an applicant currently be operating a Federal program. <sup>1/</sup> It seems apparent that an applicant could qualify under the need criteria even

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<sup>1/</sup> It would appear odd indeed to exclude from the program those tribes ostensibly most in need of it, i.e., those unable to obtain Federal contracts or grants because of the poor state of their management systems.

though not operating a Federal program. 2/ The Board concludes that the Deputy Commissioner erred, both in his apparent requirement that appellant be operating a Federal program, and in his failure to consider appellant's statement concerning its Indian Health Service grants.

Appellant challenges the Deputy Commissioner's conclusion that its application was deficient because it did not include vitae or resumes of third-party technical assistance providers. As appellant notes, the guidelines required that an application "[c]ontain the vitae or resume[s] of third party technical assistance providers or, if the provider has not been selected, a description of the qualifications for a provider to accomplish

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2/ The section of the guidelines entitled "Criteria" provides:

"To receive a technical assistance grant, a tribe, including an authorized tribal organization, must be able to document and/or demonstrate its needs utilizing three or more of the following identifying conditions or criteria:

"1. Agency-wide, single audit report findings contain significant and/or material audit exceptions;

"2. Correspondence or other documents that the tribe is able to produce clearly state that the tribe is not capable of withstanding a single audit of its total operations. This means that:

"a. The tribe's books or records are missing, incomplete or are not in reviewable condition and/or in a condition to sustain a full audit;

"b. The tribe has not met specific audit requirements for a Federal program it operates although the program is complete and an audit is due; and/or

"c. The tribe has been notified it cannot receive an initial or continuation grant or contract from one or more agencies due to outstanding audits and/or audit exceptions;

"3. The tribe has had debt collection notices and/or notification it cannot receive a grant or contract until an approved corrective action plan is formulated and is in place which has the potential to resolve current and/or past audit exceptions;

"4. The tribe is unable to accomplish current or past grant/contract objectives and/or is not capable of preparing successful grant/contract applications;

"5. The tribe is not able to operate properly under its management systems although the systems have been approved as satisfying regulatory requirements;

"6. The tribal government has little or no control over its various program operations, thus no control over service delivery, cost overruns, and there are constant and unusually large carryover balances for programs from year to year, etc.

"7. The tribal government needs help but [is] in such a state it is unable to indicate the type or amount of assistance needed.

"8. Tribal government is experiencing serious internal strife and the tribe is paralyzed with political factionalism which results in the deterioration of its government as well as its program or service delivery systems."

the grant's objectives." Appellant's application did not indicate that it had chosen a provider. Therefore, appellant contends, it was not required to include vitae or resumes with its application. Appellant further contends that it did meet the second portion of this requirement, which was an alternative to the first part. The Board finds that, to the extent the Deputy Commissioner required that appellant's application meet the first part of the quoted requirement, and failed to consider whether it met the second part, he was in error.

For the reasons discussed, the Deputy Commissioner's decision must be vacated and this matter remanded to him for further proceedings. The Deputy Commissioner should determine whether, but for the improperly considered matters, appellant's application would have been approved. Further, if he concludes that appellant's application would have been approved, the Deputy Commissioner shall further determine an appropriate remedy if, as the Board assumes, funds for the FY 1991 Training and Technical Assistance Grant Program have all been distributed.

Accordingly, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Deputy Commissioner's June 26, 1991, decision is vacated, and this matter is remanded to him for further consideration in accordance with this order.

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Anita Vogt  
Administrative Judge

I concur:

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Kathryn A. Lynn  
Chief Administrative Judge